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**SENSITIVE**

DEC 1 2009

**EXECUTIVE SESSION**

2009 NOV 30 12 5: 02

**CELA**

**FIRST GENERAL COUNSEL'S REPORT**

**SUBMITTED LATE**

MUR: 6021

DATE COMPLAINT, AS SUPPLEMENTED FILED:  
October 14, 2008

DATE OF LAST NOTIFICATION: November 20,  
2008

LAST RESPONSE RECEIVED: February 18, 2009

DATE ACTIVATED: May 5, 2009

EXPIRATION OF STATUTE OF LIMITATIONS:

Nader ballot access challenges: July 26, 2009 –

December 1, 2009; Romanelli ballot access  
challenges: March 1, 2006 – August 8, 2011

COMPLAINANT:

Ralph Nader

RESPONDENTS:

Democratic National Committee and Andrew  
Tobias, in his official capacity as treasurer; John  
Kerry; John Edwards; Kerry  
for President 2004, Inc. and David Thorne, in his  
official capacity as treasurer;  
Kerry-Edwards 2004, Inc. and David Thorne, in his  
official capacity as treasurer;  
America Coming Together; The Ballot Project;  
Uniting People for Victory; The National Progress  
Fund; and Americans for Jobs

RELEVANT STATUTES  
AND REGULATIONS:

2 U.S.C. § 433  
2 U.S.C. § 434(b)  
2 U.S.C. § 441a(2)  
2 U.S.C. § 441a(f)  
2 U.S.C. § 441b

INTERNAL REPORTS CHECKED:

FEC Disclosure Database

FEDERAL AGENCIES CHECKED:

None

**I. INTRODUCTION**

The complaint alleges a concerted effort to deny ballot access in 2004 to Ralph Nader and Peter Miguel Camejo ("Nader-Camejo") for the purpose of benefiting the Kerry Committee by the Democratic National Committee and Andrew Tobias, in his official capacity as treasurer ("DNC"); Kerry for President 2004, Inc., and David Thorne, in his official capacity as treasurer, and Kerry-Edwards 2004, Inc., and David Thorne, in his official capacity as treasurer, (collectively "the Kerry Committee"); at least fifty-three law firms and ninety-five lawyers; and more than twenty-six other organizations and individuals.<sup>1</sup> The complaint is 575 pages long, with 100 pages of allegations and 475 pages of exhibits, supplemented by a 100-page 2008 Presentment by a Pennsylvania state grand jury that charges a former Pennsylvania state representative, a former Pennsylvania House Minority Whip, and ten staffers who worked for the former Pennsylvania state representative and for the Pennsylvania House Democratic Caucus, with a "concerted plan to use taxpayer funds, employees, and resources for political campaign purposes" between 2004 and 2007.

The complaint is only one of several actions the complainant has initiated alleging violations of law stemming from an alleged concerted action to keep Nader-Camejo off the 2004 Presidential ballot in several states. Starting in 2007, Mr. Nader made the same factual allegations in separate federal lawsuits. See *Nader v. Democratic Nat'l Comm.*, 590 F.Supp.2d 164 (D.D.Cir. 2008); *Nader v. Democratic Nat'l Comm.*, 555 F.2d 137 (D.D.Cir. 2008); and *Nader v. McAuliffe*, 549 F.Supp.2d 760 (E.D. Va. 2008). In the lawsuits, Nader based his claims on abuse of process, malicious prosecution, conspiracy to abuse process and malicious prosecution, violation of his constitutional right to run for federal office and his supporters'

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<sup>1</sup> The complainant originally failed to personally sign the complaint, but, after some delay, corrected that deficiency on October 14, 2008.

1 constitutional rights to vote for him under 42 U.S.C. § 1983, and conspiracy to violate 42 U.S.C.  
2 § 1983. The district courts dismissed these cases on various grounds, including failure to state a  
3 claim, lack of subject matter jurisdiction, constitutional grounds, and *res judicata*. See *Nader v.*  
4 *Democratic Nat'l Comm.*, 555 F.2d 137 (D.D.Cir. May 27, 2008); *Nader v. Democratic Nat'l*  
5 *Comm.*, 590 F.Supp.2d 164 (D.D.Cir. December 22, 2008); and *Nader v. McAuliffe*, 593  
6 F.Supp.2d 95 (D.D.Cir. January 7, 2009). Recently, the U.S. Court of Appeals for the D.C.  
7 Circuit affirmed the dismissal of one of Nader's complaints on the grounds that he filed suit  
8 outside the statute of limitations. *Nader v. Democratic Nat. Committee*, 567 F.3d 692 (D.C.Cir.  
9 June 9, 2009), and denied Mr. Nader's petition for an *en banc* reconsideration of that outcome.  
10 *Nader v. Democratic Nat. Committee*, 567 F.3d 692 (D.C.Cir. July 28, 2009). Nader did not  
11 appeal the dismissal of the other two complaints.

12 In the present matter, according to the complaint, the alleged concerted effort to benefit  
13 the Kerry Committee resulted in several violations of the Federal Election Campaign Act of  
14 1971, as amended (the "Act"). First, the complaint alleges that the vast majority of the law firms  
15 that participated in the effort to deny Nader-Camejo access to the ballot are incorporated, and,  
16 therefore, the value of any legal services and resources that they provided without compensation,  
17 while still paying firm attorneys, constitutes an undisclosed prohibited corporate in-kind  
18 contribution to the Kerry Committee, in violation of 2 U.S.C. §§ 434(b) and 441b ("Count 1").  
19 This allegation is general and not supported by specific facts and therefore is insufficient to  
20 warrant an investigation into whether any corporate law firms made prohibited in-kind  
21 contributions to the Kerry Committee that the Kerry Committee failed to report. Accordingly,  
22 we recommend that the Commission find no reason to believe as to the Kerry Committee and the

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1 DNC, and dismiss the complaint as to others named in the complaint who may be covered by  
2 these allegations.

3 Second, the complaint alleges that the Service Employees International Union ("SEIU")  
4 made undisclosed prohibited contributions and America Coming Together ("ACT") made  
5 undisclosed excessive contributions and expenditures in connection with their coordinated efforts  
6 to deny Nader-Camejo ballot access in Oregon, in violation of 2 U.S.C. §§ 434(b) and  
7 441a(a)(1)(A) ("Count 2"). This allegation is insufficient to warrant an investigation. Therefore,  
8 we recommend that the Commission find no reason to believe that ACT violated  
9 2 U.S.C. §§ 434(b) and 441a(a)(1)(A) with respect to Count 2. Because SEIU is not a  
10 respondent, we make no recommendations as to SEIU.<sup>1</sup>

11 Third, the complaint alleges that several Section 527 organizations are "political  
12 committees" that failed to register and report with the Commission in connection with activities  
13 during 2004 to benefit the Kerry Committee or oppose the Nader-Camejo campaign, in violation  
14 of 2 U.S.C. §§ 433 and 434(b) ("Count 3"). We recommend that the Commission dismiss the  
15 complaint with respect to four of those organizations as a matter of prosecutorial discretion  
16 because all four are either defunct or have ceased operations. As to ACT, we recommend that  
17 the Commission exercise its prosecutorial discretion and dismiss the allegation pertaining to its  
18 reporting of ballot access expenditures because ACT is no longer a functioning organization, and  
19 find no reason to believe that it failed to register in violation of 2 U.S.C. § 433 because it had, in  
20 fact, registered as a political committee.

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1 Finally, the complaint, as supplemented, alleges that Pennsylvania state employees  
2 worked on petition challenges at taxpayer expense to prevent Green Party nominee Carl  
3 Romanelli from appearing on the ballot as an Independent candidate for United States Senate in  
4 2006 and indicates there may be other matters that the Commission should investigate ("Count  
5 4"). We recommend that the Commission dismiss the Count 4 allegations concerning the use of  
6 state employees to work on petition challenges to Carl Romanelli in 2006, and other allegations  
7 assertedly drawn from the 2008 Pennsylvania Presentment, which are currently subject to an  
8 ongoing state criminal investigation. Finally, we recommend that the Commission close the file  
9 in this matter as to all Respondents and others named in the complaint.

10 Combined, the complaint and the supplement (hereinafter, collectively "the complaint")  
11 name over 150 persons and entities. Before the Commission conducts any vote on the  
12 complaint, other than a vote to dismiss, any person alleged to have committed a violation of the  
13 Act must receive an opportunity to demonstrate to the Commission, in writing, why no action  
14 should be taken against such person on the basis of the complaint. See 2 U.S.C. § 437(g)(a)(1).  
15 Originally, it appeared that the complaint might be duplicative of previous MURs dismissing  
16 similar allegations, and, in order to reserve resources, as well as to comply with the practice of  
17 avoiding over-notification, we initially notified only the DNC and the Kerry Committee of the  
18 complaint. We later determined that the 527 organizations, which the complaint alleges were  
19 unregistered political committees, should also be notified. Of those respondents, only the Ballot  
20 Project and ACT responded to the complaint, and both requested and received extensions in  
21 order for them to respond to the 2004 allegations, during which time this matter was held in  
22 abeyance. We make no recommendations with respect to all of the others named in the

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complaint who did not receive notification.

## **II. DISCUSSION**

### **A. Count 1: Alleged Undisclosed Corporate Contributions to the Kerry Committee**

#### **1. Factual Background**

The Complaint maintains that in order to help the Kerry Committee win the election in 2004, "Respondents" filed 24 complaints and/or intervened in legal or administrative proceedings to challenge Nader-Camejo's nomination papers in 18 states, and they coordinated their efforts with the DNC, the Kerry Committee, and at least 18 state or local Democratic Parties. Complaint at 2-3. At least fifty-three law firms (and ninety-five lawyers nationwide) allegedly provided legal services for this effort. *Id.* at 6. Since, according to the complaint, the "vast majority of these law firms are incorporated," the value of legal services they provided free of charge while compensating the firms' attorneys constituted undisclosed prohibited in-kind contributions to the Kerry Committee. Complaint at pp. 5-6. Paragraphs 24-73, 75-77, 79-86, 88-93, 97-108, and 287 of the complaint name law firms and attorneys participating in ballot challenges. Paragraph 287 alleges that the Reed Smith law firm allegedly donated 18 attorneys to the Pennsylvania lawsuit and billed their time to "charity," without charging any clients.

In support, the complaint alleges that a Section 527 organization, the Ballot Project, worked "in conjunction with" the Kerry Committee, and that its president reportedly stated that "[w]e're doing everything we can to facilitate lawyers in over 20 states," and estimated that \$2 million in free legal services had been received. Complaint at 51. The complaint further alleges that four attorneys "affiliated" with Lawyers for Kerry, a voter monitoring project through which attorneys volunteered their time and services at polling stations, represented parties in the ballot

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1 challenge lawsuits. According to the complaint, the Lawyers for Kerry sign-up form on the  
2 Kerry Committee website stated that "We may provide your contact information to the [DNC]  
3 for ballot protection efforts," thus "providing further confirmation of direct coordination between  
4 the Kerry" Committee, "and the lawyers involved in the ballot access litigation." *Id.* at 50;  
5 Exhibit 30. In addition, the complaint relies on the sworn testimony of Dorothy Melanson,  
6 Maine Democratic chair and DNC official, that the DNC paid the costs of her ballot challenge  
7 lawsuit in Maine, and on e-mails that allegedly show that the DNC and Kerry Committee staff  
8 assisted ballot challenge lawsuits. *Id.* at 7-8, 48-49. In their responses to the complaint, both the  
9 Kerry Committee and the DNC denied the allegations in Count 1, and requested that the  
10 Commission dismiss the complaint. As discussed below, although Count 1 presents a viable  
11 legal theory, we conclude that the complaint contains insufficient information indicating that  
12 corporate law firms may have made undisclosed in-kind contributions accepted or received by  
13 the Kerry Committee to warrant proceeding as to Count 1.

## 14 2. Analysis

15 The Act prohibits corporations from making any "contribution" or "expenditure" in  
16 connection with a federal election. 2 U.S.C. § 441(b)(a). The Act defines "contribution" as the  
17 provision of something of value "for the purpose of influencing any election for Federal office."  
18 2 U.S.C. § 431(8)(A)(i). A "contribution" includes the "payment by any person of compensation  
19 for the personal services of another person which are rendered to a political committee without  
20 charge for any purpose." 2 U.S.C. § 431(8)(A)(ii). The Act specifies that legal services  
21 rendered to or on behalf of an authorized committee of a candidate are neither a contribution nor  
22 an expenditure "if the person paying for such services is the regular employer of the individual  
23 rendering such services and if such services are solely for the purpose of ensuring compliance

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1 with this Act or chapter 95 or chapter 96 of title 26." 2 U.S.C. §§ 431(8)(B)(viii)(II) and  
2 (9)(B)(vii)(II); 11 C.F.R. §§ 100.86 and 146. Further, the value of services provided without  
3 compensation by any individual who volunteers on behalf of a candidate or political committee  
4 is not a contribution or an expenditure. 11 C.F.R. §§ 100.74 and 100.111 ("volunteer  
5 exemption").

6 **a. Alleged Donation of Legal Services by Corporate Law Firms**

7 The Commission has provided guidance on the issue of whether a corporate law firm  
8 makes a contribution to an authorized candidate committee, such as the Kerry Committee, when  
9 it provides free services to the candidate in connection with a ballot challenge of the candidate's  
10 opponent. In Advisory Opinion ("AO") 2006-22 (Wallace for Congress), the Commission  
11 advised that a corporate law firm's preparation of an *amicus curiae* brief on behalf of the  
12 Wallace Committee, free of charge, in litigation addressing the ballot eligibility of the  
13 Republican nominee in Wallace's congressional district, would be a prohibited corporate in-kind  
14 contribution. AO 2006-22 relied on previous Commission advisory opinions that had concluded  
15 that ballot access litigation aimed at removing a person on a ballot constituted activity made "for  
16 the purpose of influencing an election." For example, in AO 1980-57 ("Bexar County  
17 Democratic Party"), the Commission opined that if the Bexar County Democratic Party raised  
18 funds for a federal candidate's legal efforts to challenge his opponent's ballot petitions, such  
19 financing would constitute an activity "undertaken for the purpose of influencing an election,"  
20 because "a candidate's attempt to force an election opponent off the ballot so that the electorate  
21 does not have an opportunity to vote for that opponent is as much an effort to influence an  
22 election as is a campaign advertisement derogating that opponent." The Commission also stated

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1 that since the proposed litigation expenses "are not for the purpose of ensuring compliance with  
2 the Act, they are not exempt from the definition of contribution or expenditure." See 2 U.S.C.  
3 §§ 431(8)(B)(viii)(II). Similarly, in AO 1982-35 (Hopfinan), the Commission, citing AO 1980-  
4 57, reiterated that funds raised on behalf of a candidate for federal office to finance a lawsuit aimed  
5 at removing an identified opponent from the ballot is a contribution "since the object of the  
6 requestor's lawsuit was to eliminate the electorate's opportunity to cast a vote for [the  
7 candidate's] opponent." Thus, the complaint's Count 1 is based on a viable theory, namely that  
8 spending by corporate law firms to remove a candidate from the ballot may constitute prohibited  
9 contributions. However, the available facts do not support the allegations.

10 First, even assuming that some of the fifty-three law firms and ninety-five attorneys  
11 named in Paragraphs 24-73, 75-77, 79-86, 88-93, 97-108, and 287 of the complaint assisted in  
12 legal challenges free of charge to the Democratic state and local parties and individuals who filed  
13 the ballot challenges, the complaint does not specify, with one exception, which firms allegedly  
14 provided free services or to whom, which of those firms are incorporated, and of those, which  
15 firms compensated their attorneys who worked on the ballot challenges. Without such  
16 information, and given that any free attorney services may have been provided by volunteers  
17 without any sponsorship from their employer, there is insufficient information to warrant an  
18 investigation into the 2004 activities and billing practices of the fifty-three law firms and ninety-  
19 five attorneys.

20 As for the only law firm specifically alleged to have provided free services to benefit the  
21 Kerry Committee, the information in the complaint is contradictory. Specifically, the allegation  
22 is that the Reed Smith law firm reportedly billed its costs for the Pennsylvania ballot challenge to  
23 "charity, without charging any client." That allegation is based on an October 1, 2004, article in

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1 the *American Lawyer*. Complaint at 50, Paragraph 287 and Exhibit 41. However, in response to  
2 claims asserted in that article and another press report that attorneys worked on the ballot  
3 challenges free of charge for the non-partisan purpose of ensuring ballot integrity, the complaint  
4 also alleges that the DNC's disclosure reports show that it paid Reed Smith \$136,142 in  
5 "political consulting" and "legal consulting" fees in October and November 2004. See Paragraph  
6 286. The contradictory allegations in the complaint as to whether Reed Smith was paid for its  
7 work and the lack of specific facts in the complaint indicating that the law firm paid its attorneys  
8 for their work on the ballot petition charges, as opposed to those attorneys having volunteered  
9 their time without compensation, render the only specific allegation in Count 1 insufficient to  
10 warrant an investigation of whether Reed Smith's uncompensated services, if any, constituted  
11 impermissible corporate in-kind contributions.

12 Even if there were corporate law firms that provided free services to ballot challengers  
13 while compensating their attorneys, the complaint does not present facts sufficient to support that  
14 those services constituted undisclosed in-kind contributions accepted or received by the Kerry  
15 Committee. Merely alleging that the Ballot Project worked "in conjunction with" the Kerry  
16 Committee, without supporting facts suggesting that the Ballot Project's efforts were on behalf  
17 of the Kerry Committee or other indicia of concerted activity, does not provide a sufficient basis  
18 to open an investigation. This is particularly so, where, as here, the allegation has been  
19 specifically refuted. With its response, the Ballot Project provided affidavits from several  
20 individuals, including its former president and former executive director, all stating that "[t]he  
21 Ballot Project did not undertake any of its activities at the direction, request, suggestion of, or in  
22 conjunction or concert with" the Kerry Committee, the DNC, or any state or local entities, and it

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1 acted independently of all those entities." See Ballot Project Response, Exhibits 2-5. We have  
2 no information to the contrary.

3 b. "Lawyers for Kerry"

4 Similarly, the fact that attorneys "affiliated" with Lawyers for Kerry, a voter monitoring  
5 project through which attorneys volunteered their time and services at polling stations on  
6 election day, may have also represented parties in the ballot challenge lawsuits, and that the  
7 Lawyers for Kerry sign-up form on the Kerry Committee website stated that "[w]e may provide  
8 your contact information to the [DNC] for ballot protection efforts," do not adequately tie the  
9 Kerry Committee to any effort to procure or receive undisclosed free legal services from  
10 corporate law firms. Indeed, the term "ballot protection efforts" is consistent with the stated aim  
11 of Lawyers for Kerry, which was focused on ensuring that voters—particularly Kerry voters—  
12 would be able to cast their votes on election day, not the challenging of ballot petitions. See  
13 Mark Donald, *Answering the Call: Texas Democratic Lawyers Join Effort to Protect the Vote*,  
14 *Texas Lawyer*, October 18, 2004. The website language, without more, cannot be extrapolated  
15 into evidence that the Kerry Committee was involved in an effort to obtain free corporate legal  
16 services in order to prevent Nader from being placed on the ballot. That some attorneys who  
17 were involved in Lawyers for Kerry may also have worked on ballot petition challenges does  
18 not, without more, lead to an inference that the Kerry Committee may have received prohibited  
19 in-kind contributions, as the available information does not indicate that the lawyers in question  
20 received compensation from corporate law firms for working on the ballot challenges, and if so,  
21 that the Kerry Committee had any direct connection to those lawyers' activities.

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**c. Other Allegations**

Likewise, the other information included in the complaint does not warrant an investigation of Count 1. With respect to the Melanson testimony, Dorothy Melanson, who filed the Maine challenge, testified that the Democratic Party contacted her and stated that it would support her financially with respect to her challenge. She further testified that she had not spoken to the DNC regarding the specific amount of funding she would receive in connection with the ballot challenge, and contrary to the allegation in the complaint, stated that she brought the challenge on her own and was not directed to do so by the DNC. See Complaint at 8 and Exhibit 1. In its response, the DNC maintains that Ms. Melanson filed one of the two ballot access complaints on her own behalf, and other DNC staff filed similar complaints on their own behalf without DNC direction or control. DNC Response at 6. The DNC states that there is no evidence that anything other than volunteer legal services were provided to the ballot petition challengers, "it was not a party in any of the ballot access petition challenges," and that it "did not receive and fail to report any in-kind legal services from law firms representing ballot access petition challengers." See DNC Response at 6-8. *Id.* The most the Melanson testimony suggests is that the DNC may have paid some or all of her legal costs, not that it recruited and obtained free legal services, and it fails to show any link at all to the Kerry Committee.

Similarly, the e-mails cited in the complaint as evidence of a coordinated scheme do not specifically tie the Kerry Committee to any concerted effort to procure or receive prohibited in-kind corporate contributions. Exhibit 7 of the complaint includes an e-mail communication from Caroline Adler, who is described as a DNC and Kerry Committee employee, to DNC employees who helped prepare challenges to Nader-Camejo's nomination papers. The e-mail, with the

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1 subject entitled "DNC's Anti-Nader phone script," includes an attachment entitled "Script for  
2 Nader Petition Signers," which DNC employees allegedly used as a guideline when calling to  
3 talk to people who signed Nader-Camejo's petitions. Exhibit 9 includes an e-mail from Judy  
4 Reardon, the Kerry Committee's deputy national director for Northern New England. According  
5 to the complaint, this e-mail indicates that Ms. Reardon herself drafted one of the complaints  
6 against Nader-Camejo and coordinated with the state Democratic Party officials and attorneys  
7 who filed it. Martha Van Oot, an attorney who represented parties attempting to deny Nader-  
8 Camejo ballot access in New Hampshire, replies "Great job, Judy," with her own hand-written  
9 revisions attached. New Hampshire Democratic Party Chair and DNC official Kathleen  
10 Sullivan, who filed the complaint, was copied on this exchange.

11 In its response, the DNC states that the e-mails do not indicate that the DNC itself filed  
12 the ballot petition challenges, or provide evidence that the DNC accepted corporate in-kind  
13 contributions from law firms. DNC Response at 10. The Kerry Committee states that the  
14 allegation that it accepted prohibited corporate contributions in the form of legal services is  
15 "false," and that it had every right to pay staffers who engaged in ballot access litigation and to  
16 use unlimited volunteer attorneys. Kerry Committee Response at 6-7. It asserts that its "limited  
17 involvement in ballot access litigation and its awareness of the litigation engaged in by others—  
18 both on a volunteer and paid basis—simply does not constitute a violation of the Act." *Id.* at 8.  
19 Further, it states that the complaint does not point to any specific facts indicating that attorney  
20 volunteers were compensated in any way for their volunteer work. *Id.* at 7. We agree.

21 Complainant maintains in his cover letter to the supplement that the 2008 Pennsylvania  
22 Grand Jury Presentment supports his allegations that unnamed "Respondents" specifically  
23 intended to benefit "the Kerry Committee by challenging the Nader-Camejo Pennsylvania ballot

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1 petitions," and that unnamed "Respondents" made undisclosed contributions to the Kerry  
2 Committee. However, the Presentment does not contain facts supporting alleged undisclosed  
3 prohibited corporate contributions by law firms to the Kerry Committee. The Presentment states  
4 at page 55, as an introduction to the description of an alleged scheme to have state employees  
5 work on the Nader challenge at taxpayer expense, that "[i]t was generally assumed, in  
6 Democratic circles, that Nader's appearance on the ballot would be detrimental to Democratic  
7 Presidential Candidate John Kerry, since Nader would siphon votes from Kerry." From this  
8 statement, the supplement purportedly derives support for the complaint's allegations that  
9 unnamed "Respondents specifically intended to benefit" the Kerry Committee and "made  
10 unlawful and unreported contributions to" it. Supplement at 10. Moreover, complainant asserts  
11 that a law firm, not named in the Presentment, which was involved in the Pennsylvania Nader  
12 challenge was "retained by or received payment from the Respondents who orchestrated  
13 Respondents' nationwide effort to deny ballot access to Nader-Camejo" to support "the inference  
14 that Respondents' related conduct in 17 other states was likewise intended to benefit" the Kerry  
15 Committee, and that the law firm made a contribution to the Kerry Committee. *Id.* at 10-12.<sup>3</sup>  
16 However, the Presentment makes no findings as to the Kerry Committee or the law firm, and  
17 does not link any of the activities charged to any activities or knowledge of the Kerry  
18 Committee, the DNC, lawyers, or to any actors outside of Pennsylvania. Therefore, it adds no  
19 support to complainant's allegations in Count 1.

20  
<sup>3</sup> Although acknowledging that the Presentment does not name the law firm, the complainant states that there is "little doubt" that Reed Smith was the law firm that filed the challenge to the Nader-Camejo 2004 Pennsylvania nomination papers. Cover letter to Supplement at 12. The cover letter to the supplement goes on to acknowledge that the Presentment also does not specifically state that the attorneys who filed the Pennsylvania charge knew it was prepared using funds and resources misappropriated from the taxpayers, but then asserts that the Presentment suggested they knew or should have known. *Id.* Even if that were so, that suggestion does not constitute a FECA violation.

**d. Conclusion**

The Commission has stated that "unwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true," and "[s]uch purely speculative charges, especially when accompanied by a direct refutation, do not form an adequate basis to find reason to believe that a violation of the FECA has occurred." See Statement of Reasons, MUR 4960 (Hillary Rodham Clinton for Senate Exploratory Committee, issued December 21, 2000) (citations omitted). Here, without specific facts suggesting that (1) attorneys from corporate law firms assisting in Nader ballot challenges were compensated by their firms for this work, and (2) even if they were, that the Kerry Committee played a role in this activity, rather than just being the indirect beneficiary, there is nothing left but speculative charges that have been directly refuted, providing an insufficient basis for an investigation.

Accordingly, we recommend that the Commission find no reason to believe that John Kerry violated the Federal Election Campaign Act of 1971, as amended, or the Commission's regulations. We also recommend that the Commission find no reason to believe that Kerry for President 2004, Inc., and David Thorne, in his official capacity as treasurer, and Kerry-Edwards 2004, Inc. and David Thorne, in his official capacity as treasurer, violated 2 U.S.C. §§ 434(b) and 441b(a) by accepting, and failing to disclose, prohibited contributions from corporate law firms. Because the DNC was notified of the complaint and responded to it regarding the allegations in Count 1, we also recommend that the Commission find no reason to believe that the Democratic National Committee and Andrew Tobias, in his official capacity as

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1 treasurer, violated 2 U.S.C. §§ 434(b) and 441b(a) by accepting, and failing to disclose,  
2 prohibited contributions from corporate law firms.<sup>4</sup>

3 **B. Count 2: Allegations Relating to the Activities of ACT and SEIU**

4 **1. Factual Background**

5 Count 2 of the complaint alleges that ACT and SEIU jointly planned and executed an  
6 effort to prevent Nader-Camejo from being placed on the ballot in the State of Oregon, resulting  
7 in prohibited and undisclosed contributions and expenditures. Complaint at 93. In support, the  
8 complaint refers to an August 16, 2004, blog entry from ACT employee William Gillis, who  
9 stated that ACT shared the Portland, Oregon, office space with political campaign staff from  
10 SEIU, and that he witnessed "higher echelons of both staffs" organize "a concerted effort among  
11 the ACT/SEIU staff to attack the Nader petition drive," by signing petitions where petitioners  
12 were required to sign, and then scratching out the signatures, thereby invalidating the entire  
13 petition. Complaint at 74. It also attempts to link SEIU and the DNC by noting that SEIU's  
14 Secretary-Treasurer, Anna Burger, is a DNC official, and SEIU both "endorsed and publicly  
15 committed its resources to electing Kerry in 2004." Complaint at 76. Exhibit 27 of the

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<sup>4</sup> In their responses to the complaint, the Kerry Committee and the DNC maintain that Count 1 should be dismissed because the Commission rejected the same allegations in MUR 5509 (Kerry-Edwards and the DNC). In that matter, Lenora B. Fulani, president of the Committee for a Unified Independent Party, alleged that the respondents improperly used public funds to keep Nader off the ballot in 2004, in violation of the Presidential Election Campaign Act. The Commission found no reason to believe the respondents violated the Act. The First General Counsel's Report in MUR 5509, which is the document on the public record explaining the Commission's findings, states that the allegations were speculative and insufficiently specific to justify an investigation; that much, if not all, of the activity in the complaint might be exempt volunteer activity; and that even if the Kerry Committee made expenditures in a ballot challenge effort, the expenditures may be qualified campaign expenses. While the complaints in both MURs 5509 and 6021 cite a 2004 New York Times article in which the Ballot Project's president stated that he was coordinating with election lawyers in several states to challenge Nader's ballot petitions, refer to a 2004 Business Week article quoting then-DNC Chairman Terry McAuliffe's statement "We can't afford to have Ralph Nader in the race," and cite to efforts by state Democratic Party officials or party activists to challenge Nader's ballot petitions, because Count 1 of the MUR 6021 complaint is premised on a different theory of violation, namely that corporate law firms made, and the DNC and Kerry Committee received, prohibited and undisclosed contributions, and contains additional information, it is not duplicative of the prior MUR. Accordingly, we believe a dismissal of this matter on the basis that Count 1 of the MUR 6021 complaint contains some of the same factual allegations as those in the complaint in MUR 5509 is unwarranted.



1 complaint lists Ms. Burger as a "member-at-large" on the DNC's membership roster in 2004.  
2 Count 2 also alleges that SEIU made an excessive or prohibited contribution to the DNC based  
3 on a November 1, 2004, press release entitled "Anatomy of an Election Strategy: The Facts on  
4 SEIU's Role in Bringing Home a Victory for America's Working Families," in which SEIU  
5 claims that among the specific acts it took to shape the outcome of the 2004 election was giving  
6 \$1 million to the DNC. Complaint at 94, Exhibit 60. A separate document attached to the press  
7 release specifies that "SEIU contributed \$1,000,000 to fund various DNC activities." *Id.*

8 In response to these allegations, ACT states that the complaint fails to explain how its  
9 alleged activities in Oregon constituted a contribution, as it does not allege any contacts between  
10 ACT and either the Kerry Committee or the DNC, or any DNC, Kerry Committee, or Oregon  
11 Democratic Party involvement in the alleged ACT/SEIU joint effort to prevent ballot access for  
12 Nader-Camejo. ACT Response at 7. Further, ACT states that while Count 2 of the complaint  
13 alleges various financial transactions between SEIU and DNC, there is no allegation that any of  
14 these transactions or political activities were tied to this particular allegation, or that ACT had  
15 any contacts with the DNC, the Kerry Committee, or the Oregon Democratic Party. *Id.* at 8.  
16 The DNC and Kerry Committee Respondents did not respond to this aspect of the complaint,  
17 while SEIU was not notified of the complaint.

## 18 2. Analysis

19 The Act prohibits labor organizations like SEIU from making contributions to any  
20 candidate, campaign committee, or political party or organization in connection with any election  
21 to federal election. 2 U.S.C. § 441b. In 2004, the Act also limited contributions by entities like  
22 SEIU's PAC to any candidate or his or her authorized political committee with respect to any  
23 election for federal office, which, in the aggregate, exceeded \$5,000. 2 U.S.C. § 441a(a)(2)(A)

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1 (2004). With respect to political committees established and maintained by a national political  
2 party, which are not the authorized political committees of any candidate, the Act also limited  
3 contributions by entities like SEIU's PAC to \$15,000 per calendar year. 2 U.S.C. § 441a(2)(B).

4 The allegations in Count 2 of the complaint are insufficient for two reasons. First, the  
5 complaint does not allege, and the available information does not suggest, that SEIU's and  
6 ACT's activities in Oregon were coordinated with the Kerry Committee, the DNC, or any other  
7 entity. The fact that Anna Burger, an SEIU official, is also a member-at-large of the DNC, does  
8 not, without more, suggest otherwise, as such at-large membership within the DNC does not  
9 provide a basis to infer that she was "materially involved" or even aware of material information  
10 in the decision-making of the DNC's plans, projects, or needs. 11 C.F.R. § 109.21(d)(2). The  
11 available information does not indicate that Ms. Burger was a member of the DNC's Executive  
12 Committee, the only committee within the DNC responsible for such decision-making. See The  
13 Charter and the Bylaws of the Democratic Party of the United States (as amended Jan. 19,  
14 2002).<sup>5</sup> Further, the complaint's allegation that ACT and SEIU shared facilities and organized  
15 "an attack" on the Nader petition drive similarly provides no link between such factual  
16 allegations and either the Kerry Committee or the DNC.

17 Second, with respect to SEIU, the complaint's allegation that SEIU made a prohibited or  
18 excessive contribution to the DNC is based upon a press release stating that SEIU gave \$1  
19 million to the DNC. This statement has a number of possible meanings, and the possibility that  
20 SEIU made and intended to publicize a \$1 million contribution to the DNC seems unlikely and  
21 has been generally refuted by SEIU in a prior MUR. In MUR 5612 (SEIU), where the

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<sup>5</sup> Compare MURs 5403, 5427, 5440 and 5466 (The Media Fund ("TMF")) (TMF President Harold Ickes' simultaneous leadership position on the DNC Executive Committee, a committee recognized in the applicable Charter as "responsible for the conduct of the affairs of the Democratic Party," provided a basis to investigate whether TMF satisfied the material involvement prong of the Coordinated Communications test).

1 Commission found no reason to believe that SEIU or the DNC violated 2 U.S.C. § 441b in  
2 connection with a fundraiser that allegedly forwarded the proceeds from the event to the DNC,  
3 the complaint relied in part on the same SEIU press release. In response to that complaint, SEIU  
4 stated that it had engaged in political activities that did not provide a basis for a complaint, such  
5 as lobbying, voter education, voter registration, and get-out-the vote drives, but not independent  
6 expenditures or electioneering communications. SEIU also stated that no general treasury funds  
7 were used to support independent expenditures or contributions. We have no information to the  
8 contrary. The FEC disclosure database does not reveal any direct contributions by SEIU itself to  
9 the DNC; SEIU's political action committee disclosed contributions totaling only \$30,000 to the  
10 DNC during the 2004 election cycle.

11 In sum, the complaint's allegations as to ACT's and SEIU's activities in Count 2 of the  
12 complaint contain insufficient supporting facts to warrant an investigation that SEIU and ACT  
13 made in-kind contributions to any political committees in connection with their alleged activities.  
14 Accordingly, we recommend that the Commission find no reason to believe that America  
15 Coming Together made undisclosed excessive in-kind contributions in violation of 2 U.S.C.  
16 §§ 434(b) and 441a(a)(1)(A). We further recommend that the Commission find no reason to  
17 believe that the Democratic National Committee and Andrew Tobias, in his official capacity as  
18 treasurer, Kerry for President 2004, Inc., and David Thorne, in his official capacity as treasurer,  
19 and Kerry-Edwards 2004, Inc. and David Thorne, in his official capacity as treasurer, violated  
20 2 U.S.C. §§ 441b and 441a(f) in connection with Count 2. Because SEIU is not a respondent, we  
21 make no recommendations as to Service Employees International Union.

**C. Count 3: Allegations that Certain 527 Organizations are Political Committees that Failed to Register and Disclose Their Activities**

**1. Factual Background**

The complaint alleges that five Section 527 organizations that were active during the 2004 election cycle violated the Act by failing to register and report as political committees. Specifically, the complaint alleges that (1) ACT received contributions and made expenditures in unspecified amounts to influence a federal election, including the compensation paid to ACT staffers who participated in ballot access challenges, Complaint at 95-97; (2) the Ballot Project retained and recruited law firms to sue the Nader Campaign in at least 18 states, spending at least \$331,398 for this purpose, and soliciting at least \$2 million more in free legal services from law firms that sued Nader; (3) Uniting People for Victory ("UP for Victory") spent approximately \$235,000 on advertisements, fact sheets, flyers, letters to the editor and related material that expressly advocated the defeat of Nader; (4) Americans for Jobs raised and spent \$1 million during the 2004 election cycle opposing Howard Dean's candidacy through television advertisements; and (5) the National Progress Fund raised and spent at least \$516,334 and produced and broadcast at least eight different radio and television commercials, each of which expressly advocated against the election of Nader-Camejo.

As discussed below, we recommend that the Commission find no reason to believe that ACT failed to register as a political committee and exercise its prosecutorial discretion and dismiss the Count 3 allegations as to all of the other aforementioned organizations.

**2. Analysis**

**a. Spending Aimed at Removing a Candidate from the Ballot  
Constitutes an Expenditure**

ACT and the Ballot Project, the only 527 organizations that responded to the complaint, maintain that the allegations as to them do not warrant further action. Specifically, both question whether spending designed to prevent a federal candidate from qualifying for a ballot is an expenditure under the Act. ACT maintains that in AO 1996-39 (Heintz for Congress), the Commission concluded that entities such as ACT could establish a separate nonfederal account and disbursements from such account would not be treated as contributions or expenditures for purposes of the Act, even if the funds were used to discourage petition-signers of other candidates. ACT Response at 6. The Ballot Project's response contends that the Commission's distinction between funding a ballot access challenge and the defense of that challenge found in its Advisory Opinions is unconstitutional, noting that there "is no constitutionally sufficient justification for requiring a candidate to use funds raised under the Act's limitations and prohibitions to advance a claim that an opponent's ballot access efforts have not complied with state law, while allowing the opponent defending against the challenge to use money raised outside of those same limitations and prohibitions." Ballot Project Response at 16. It argues that such a distinction stands in sharp contrast to *Davis v. FEC*, 128 S. Ct. 2759, 2774 (2008), where the Court stated that "imposing different contribution and coordinated party expenditure limits on candidates vying for the same seat is antithetical to the First Amendment." *Id.* Additionally, the Ballot Project contends that a ballot access challenge undertaken independently of a candidate is outside of the purview of the Act, as it is "far more removed from being for the

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1 purpose of influencing a federal candidate than was the funding of activity of the candidate in  
2 AO 1996-39 who was defending her place on the ballot." *Id.* at 17.

3 Spending aimed at removing a person from a ballot constitutes an expenditure. While the  
4 Ballot Project suggests that only in-kind contributions stemming from a coordinated effort with  
5 the candidate can be subject to the Act, the Act's definition of expenditure applies to "anything  
6 of value made by *any* person for the purpose of influencing any election for Federal office."  
7 2 U.S.C. § 431(8)(A)(i) and (9)(A)(i) (emphasis added). The term "person" includes an  
8 individual, partnership, committee, association, corporation, labor organization, or any other  
9 organization or group of person. See 2 U.S.C. § 431(11). The actions of any person—candidate  
10 or a political committee—in expending resources to remove a person from a ballot carries the  
11 same impact, as both are influencing an election by eliminating the electorate's opportunity to  
12 vote for a particular candidate. The identity of the person engaging in such litigation should not  
13 matter, because the public is left with fewer voting options in either event. The attempt to  
14 deprive the electorate's opportunity to vote for a given candidate constitutes activity made for the  
15 purpose of influencing an election. See, e.g., AO 1982-35 (Hopfman) and discussion in Section  
16 II.A.2, *supra*.

17 Respondents' arguments for placing such activity outside the purview of the Act are  
18 flawed. First, ACT's interpretation of AO 1996-39 (Heintz for Congress) is incorrect. In that  
19 AO, the requestor was a Republican congressional candidate whose primary election nominating  
20 petitions were contested by the Michigan Democratic Party and one of her Republican  
21 challengers. As the Michigan Board of Canvassers deadlocked in reaching a decision on the  
22 validity of the petitions, the matter went before the Michigan Court of Appeals on a writ of  
23 mandamus. Heintz asked the Commission to consider whether she could set up a separate

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1 account to pay for legal expenses incurred in defending her nominating petitions against the  
2 challenge. The Commission advised Heintz that she could do so, as it concluded that funds  
3 raised to defray the cost of legal expenses are outside the scope of the Act. However, ACT  
4 mistakenly assumes that the Commission concluded that spending from a separate fund to  
5 remove a person from the ballot would not be within the scope of the Act. That is simply not the  
6 case. In the same AO upon which ACT relies, the Commission specifically advised that the  
7 proposed activity before it—setting up an account to pay for defensive litigation to petition  
8 challenges—was distinguishable from that in AO 1980-57 where funds raised on behalf of a  
9 candidate for federal office to finance a lawsuit aimed at removing an identified opponent from the  
10 ballot were deemed to be for the purpose of influencing an election, and consequently, within the  
11 purview of the Act. See AO 1996-39, footnote 3.

12 Thus, the Commission has consistently drawn a distinction between efforts aimed at  
13 preventing the electorate from voting for a particular opponent, which are deemed to constitute  
14 contributions or expenditures, and efforts to defend one's own ballot position, which are not.  
15 Unlike ballot access challenges, the Commission has classified legal efforts defending a  
16 candidate's ballot position as "defensive litigation" consistent with Commission regulations that  
17 explicitly recognize the role of legal expense funds. See MUR 5533 (Michigan Republican State  
18 Central Committee) Statement of Reasons of Vice Chairman Michael E. Toner and  
19 Commissioners David M. Mason, Bradley A. Smith and Ellen L. Weintraub; see also AO 2003-  
20 15 (Majette). The Commission has consistently concluded in instances where legal expenses  
21 would be used exclusively for the purpose of defraying legal costs incurred to defend a  
22 candidate's ballot position that such payments would not be considered made for the purpose of  
23 influencing an election; rather, they are for the purpose of paying an expense that might

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1 otherwise be considered to be personal use of campaign funds. *Id.* at 3-4, citing AOs 1983-37,  
2 1982-35, 1983-30 and 1996-39. *See also* 11 C.F.R. § 113.1(g)(6)(i) (a donation to a legal  
3 expense trust fund established in accordance with the rules of the United States Senate or the  
4 United States House of Representatives is not considered a contribution by a third party to pay an  
5 expense that might otherwise be considered to be personal use of campaign funds).

6 By contrast, spending aimed at removing a candidate from the ballot attempts to alter the  
7 number of the choices available to the electorate, just as spending to place candidates on the  
8 ballot does. With respect to expenditures to place a person on the ballot, the Commission  
9 concluded that persons other than candidates may expend such funds, subject to disclosure  
10 requirements. *See* MUR 5533 Statement of Reasons at 2 (concluding that the Michigan  
11 Republican State Central Committee's reporting of its expenditures relating to the promotion of  
12 Ralph Nader's ballot access was proper). Expenditures designed to deny ballot access, while  
13 also permissible, must similarly comply with disclosure requirements. *See, e.g.,* AO 1980-57.

14 Further, Ballot Project's reliance on *Davis* is misplaced. In that case, the Supreme Court  
15 invalidated asymmetrical contribution and coordinated party expenditure limits based on how  
16 much a candidate spent in personal funds. There, the end result of the challenged provisions was  
17 that some candidates were entitled to higher contribution and coordinated party limits than their  
18 respective opponents. In essence, spending by the self-funder under the Millionaires'  
19 Amendment triggered beneficial treatment for the other candidate, leading the Court to find that  
20 the operation of the Amendment unconstitutionally chilled the self-funder's speech. Here, the  
21 threat of chilled speech is not present, as attacking and defending ballot positions are two  
22 separate and distinct activities, unlike fundraising for the campaign activity at issue in *Davis*.  
23 There is no imbalance between any persons with respect to spending to remove a candidate. All

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1 persons have the option to spend unlimited federally compliant funds for such expenditures with  
2 no triggers that benefit one person over another; they are only subject to the Act's disclosure  
3 requirements. As for funds used for the legal defense of a candidate, which generally do not fall  
4 within the reach of the Act, no person is adversely affected by this exemption, as all candidates  
5 are entitled to such spending without contribution or expenditure limitations. This lack of  
6 differential treatment with respect to these separate ballot activities stands in sharp contrast to  
7 *Davis*, where the Court held that there was no valid reason for such treatment of each side's  
8 fundraising for campaign activity. As such, *Davis* is inapplicable here. Accordingly, contrary to  
9 the arguments advanced by ACT and the Ballot Project, spending to remove candidates from the  
10 ballot are expenditures that fall within the scope of the Act.

11 **b. ACT is a Registered Political Committee and both ACT**  
12 **and the Ballot Project are Defunct Organizations**  
13

14 The Act defines a "political committee" as any committee, club, association, or  
15 other group of persons that receives "contributions" or makes "expenditures" for the purpose of  
16 influencing a federal election that aggregate in excess of \$1,000 during a calendar year. 2 U.S.C.  
17 § 431(4)(A). Political committees must register with the Commission and file periodic reports of  
18 their receipts and disbursements for disclosure to the public. 2 U.S.C. §§ 433 and 434. To  
19 address overbreadth concerns, the Supreme Court has held that only organizations whose major  
20 purpose is campaign activity can potentially qualify as political committees under the Act. *See,*  
21 *e.g., Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *FEC v. Massachusetts Citizens for Life*, 479 U.S.  
22 238, 262 (1986). The Commission interprets this rule as encompassing only organizations  
23 whose major purpose is federal campaign activity. *See Political Committee Status:*  
24 *Supplemental Explanation and Justification*, 72 Fed. Reg. 5595, 5597, 5601 (Feb. 7, 2007).

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1 In response to the complaint, ACT maintains that the complaint misidentifies it as a  
2 nonfederal "Section 527 organization," noting that it "was (and remains) *both a federal political*  
3 *committee and a nonfederal 527 organization.*" ACT Response at 6 (Emphasis in original).  
4 ACT refers to the Conciliation Agreement executed by the Commission and ACT in MURs 5403  
5 and 5466 in August 2007, which noted that "ACT was established in July 2003 with federal and  
6 nonfederal accounts pursuant to 11 C.F.R. § 102.5." See MUR 5403 and 5466 Conciliation  
7 Agreement at Paragraph 1, page 2. ACT also states that those accounts are registered with, and  
8 report to, the Commission and the Internal Revenue Service ("IRS"). ACT Response at 6. The  
9 FEC disclosure database shows that ACT is in fact a registered political committee, and has been  
10 so since 2003. Therefore, the allegation that ACT failed to register as a political committee is  
11 incorrect. Accordingly, we recommend that the Commission find no reason to believe that it  
12 failed to register as a political committee in violation of 2 U.S.C. § 433.

13 According to the complaint, ACT allegedly paid staffers for activities directed toward  
14 denying Nader-Camejo ballot access. ACT's response to the complaint neither confirms nor  
15 denies that it spent funds with respect to ballot access challenges, and the FEC disclosure  
16 database does not reveal such disbursements. Nonetheless, based on a combination of factors,  
17 the Commission should not proceed further as to ACT. ACT is essentially a defunct  
18 organization. In response to the complaint, ACT stated that it "no longer exists as a functioning  
19 organization" and has suspended ongoing active operations since 2005, with plans to terminate  
20 its affairs upon completion of this matter. ACT Response at 12. See MUR 5534 (Business  
21 Alaska) (where Business Alaska was essentially defunct with minimal or no assets, had been  
22 inactive for several years, and had little potential for future fundraising given its representation  
23 that it intended to terminate as a corporation, the Commission decided to take no further action in

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1 an exercise of prosecutorial discretion and close the file). While we would argue that any failure  
2 to disclose expenditures for ballot access efforts on its disclosure reports filed with the  
3 Commission is a continuing violation for purposes of the statute of limitations, given that the  
4 alleged activity is five years old, we would expect any investigation to encounter difficulties with  
5 obtaining relevant documents and retrieving stale witness memories. Moreover, ACT already  
6 paid a substantial civil penalty for violations during the 2004 election cycle in MUR 5466. With  
7 respect to the Ballot Project, although the complaint alleges that at least \$331,398 of the Ballot  
8 Project's IRS-reported disbursements represent ballot access expenditures subject to the Act,  
9 thereby requiring the Ballot Project to register and report as a political committee, the Ballot  
10 Project states in its response that it dissolved on September 12, 2005. Ballot Project Response at  
11 2. As with ACT, in addition to the Ballot Project being a defunct organization, the age of its  
12 alleged activity would render an investigation exceedingly difficult. Under these circumstances,  
13 we recommend that the Commission exercise its prosecutorial discretion and dismiss the  
14 allegation that America Coming Together violated section 434(b), and dismiss the allegations  
15 that the Ballot Project violated 2 U.S.C. §§ 433 and 434. *See Heckler v. Chaney*, 470 U.S. 821  
16 (1985).

17 **c. The Other 527 Organizations are Also Defunct**  
18

19 The complaint alleges that United People for Victory ("UP for Victory"), Americans for  
20 Jobs and National Progress Fund made expenditures during the 2004 election cycle that may  
21 have triggered committee status. Publicly available information indicates that Up for Victory  
22 reportedly disseminated "open letters" via newspaper advertisements signed by numerous people  
23 urging people to vote for Kerry instead of Nader with statements like "Your vote is your voice in  
24 this election. Make both of them heard loud and clear. Tell your friends and associates that the

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1 only practical way to safeguard the nation and the world is to vote for John Kerry for President  
2 of the United States." See Complaint, Exhibit 21. See also Josh Nelson, *Nader: Liberals are*  
3 *'morally bankrupt,'* Iowa State Daily, October 29, 2004. See also Gabrielle Crist, *Ads Urge*  
4 *Nader to Kerry Hop*, Rocky Mountain News, October 30, 2004.

5 Americans for Jobs reportedly ran television advertisements before the New Hampshire  
6 and South Carolina primary elections that challenged Howard Dean's foreign policy  
7 qualifications to be President. For example, it aired the following, filled with imagery of Osama  
8 Bin Laden:

9 *We live in a very dangerous world.*  
10 *And there are those who wake up every morning determined to destroy western*  
11 *civilization....*  
12 *Americans want a president who can face the dangers ahead.*  
13 *But Howard Dean has no military or foreign policy experience.*  
14 *And Howard Dean just cannot compete with George Bush on foreign policy.*  
15 *It's time for Democrats to think about that ... and think about it now.*  
16 See <http://www.cbsnews.com/stories/2003/12/16/politics/main588924.shtml>.

17 The National Progress Fund reportedly produced and aired numerous television  
18 advertisements in key battleground states that challenged the qualifications of President Bush.  
19 For example, on September 30, 2004, the advertisement "One Question" aired in television  
20 markets in Florida, also filled with imagery of Osama Bin Laden, with the following text:

21 *Male Announcer:* *There is one question George Bush does*  
22 *not want to be asked.*  
23 *It is the question that will define his presidency.*  
24 *"Are we safer now than we were four years ago?"*  
25 *Well, you decide....*  
26 *Every day the bloody chaos in Iraq grows.*  
27 *Al Qaeda still threatens us at home and abroad.*  
28 *America's ports, its borders, our cities remain needlessly*  
29 *vulnerable to terrorist attack.*  
30 *And after three years...Osama Bin laden, the murderer of*  
31 *thousands of innocent Americans, is still at large....*  
32 *Are we safer now than we were four years ago?*

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*The answer, Mr. President...is no.  
Your policies have failed us.*

See <http://www.gwu.edu/%7Eaction/2004/ads04/naderf093004.html>. Another advertisement features a voter stating that he made a mistake voting for Nader in 2000 since President Bush "has wounded our country." See <http://www.gwu.edu/%7Eaction/2004/ads04/naderf052504.html>.

We do not recommend that the Commission proceed further because it appears that each of them is either defunct or has ceased operations. While Americans for Jobs, UP for Victory, and the National Progress Fund did not respond to the complaint, the available information shows that they filed their final IRS reports in July 2004, January 2006, and March 2006, respectively, each reporting \$0 in receipts. Under these circumstances, we recommend that the Commission exercise its prosecutorial discretion and dismiss the allegations that the National Progress Fund, Uniting People for Victory, and Americans for Jobs violated 2 U.S.C. §§ 433 and 434(b). See *Heckler v. Chaney*, 470 U.S. 821 (1985); see also MUR 5534 (Business Alaska).

**D. Count 4: Allegations Involving the 2006 Romanelli Campaign**

The 2008 Pennsylvania Grand Jury Presentment alleges that there was a scheme involving state employees working at taxpayer expense to keep Carl Romanelli, an Independent candidate for Senate in 2006, from appearing on the ballot. Complainant suggests that these allegations may warrant an investigation by the Commission of unspecified violations of the Act. Supplement Cover Letter at 3. Moreover, complainant suggests that "additional factors relating to the Romanelli petition challenge require further investigation," other than those related to the alleged state employee scheme. *Id.* at 13. The alleged factors involve a lawyer with a firm that

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1 apparently represented the challengers, who was also the Statewide Election Law Co-  
2 Coordinator for former Pennsylvania State treasurer Bob Casey's 2006 campaign for U.S. Senate  
3 for Pennsylvania ("Casey Campaign"). *Id.* at 13-14. Using that information (not contained in  
4 the Presentment) and based on a statement on page 58 of the Presentment that the goal of the  
5 challenge was to "enhance the electability of the Democratic nominee, Robert Casey," the  
6 complainant alleges that the Presentment "indicates that Mr. Casey's successful 2006 senatorial  
7 campaign benefited from a substantial infusion of cash, paid from the Pennsylvania Treasury  
8 while Mr. Casey was Treasurer, to state employees who were doing political campaign work on  
9 his behalf and in cooperation with his Election Law Co-Coordinator." *Id.* at 14. That allegation,  
10 however, is not in the Presentment, and the Presentment does not charge Mr. Casey, his  
11 campaign, the law firm or the lawyer with any wrongdoing. In light of these factors, the ongoing  
12 state criminal investigation into whether state employees were paid for political activities, and  
13 the likelihood that an investigation would require an extensive amount of the Commission's  
14 limited resources, we recommend that the Commission dismiss the complaint, as to persons and  
15 entities that might be covered by the allegations in Count 4.<sup>6</sup> Finally, we recommend that the  
16 Commission close the MUR 6021 file as to all Respondents and other persons and entities named  
17 in the complaint in MUR 6021.

<sup>6</sup> Complainant also requests that the Commission refer the information and materials in the Presentment to the Department of Justice to determine whether "certain Respondents or any other parties committed criminal violations of federal law in connection with" the 2006 Romanelli challenge. Cover letter to Supplement at 3, 14. The complainant issued a press release, however, reporting he had already sent letters urging the Commission, DOJ, and the FBI to investigate this conduct on the same day he filed the supplement with the Commission. See Ralph Nader calls on Federal Authorities to Investigate Evidence of Federal Crimes Arising from "Bonusgate" Scandal, available at <http://grassrootsga.com/2008/09/24/> (September 24, 2008).

**III. RECOMMENDATIONS**

1. Find no reason to believe that the Democratic National Committee, and Andrew Tobias, in his official capacity as treasurer, violated 2 U.S.C. §§ 441a(f), 441b and 434(b).
2. Find no reason to believe that Kerry for President 2004, Inc. and David Thorne, in his official capacity as treasurer, violated 2 U.S.C. §§ 441b, 441a(f) and 434(b).
3. Find no reason to believe that Kerry-Edwards 2004, Inc. and David Thorne, in his official capacity as treasurer, violated 2 U.S.C. §§ 441b, 441a(f) and 434(b).
4. Find no reason to believe that John Kerry violated the Federal Election Campaign Act of 1971, as amended, or the Commission's regulations.
5. Find no reason to believe that America Coming Together violated 2 U.S.C. § 434(b) and 441a(a)(1)(A) with respect to the allegation that it made an undisclosed excessive in-kind contribution.
6. Find no reason to believe America Coming Together violated 2 U.S.C. § 433.
7. Dismiss the complaint as to the Ballot Project.
8. Dismiss the complaint as to National Progress Fund, Uniting People for Victory, and Americans for Jobs.
9. Dismiss the complaint as to America Coming Together with respect to the allegation that it violated 2 U.S.C. § 434 by failing to report ballot expenditures.
10. Approve the attached Factual and Legal Analyses.
11. Approve the appropriate letters.

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12. Close the MUR 6021 file as to all Respondents and other persons and entities  
named in the complaint, as supplemented.

11/30/2009  
Date

BY:



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Ann Marie Terzaken  
Associate General Counsel  
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Susan L. Lebeaux  
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